[ORIGINAL CIVIL JURISDICTION]

[APPELLATE CIVIL JURISDICTION]

## THAM HING KWAI v. STATE OF NEGRI SEMBILAN & OTHERS.

[SEREMBAN CIVIL SUIT No. 75 OF 1931]

[KUALA LUMPUR CIVIL APPEAL No. 9 OF 1931]

*Sale of Land—default in payment of quit rent—annulment of sale—defects in notice of sale—substantial injury—Land Code Enactment (1926), Ss. 202, 205, 206, 208, 209 and 221 (i).*

The failure of the Collector of Land Revenue, in taking proceedings for the recovery of arrears of rent by attachment and sale of immoveable property, to observe the provisions of section 208 of the Land Code Enactment of 1926 would render such proceedings invalid and would entitle the person whose land is sold to damages.

The plaintiff (appellant) who was the registered owner of a piece of land of some 9 acres in area and comprised in Grant No. 4381, which in situated on the sea-shore not far from Port Dickson, failed to pay the quit rent due to the State for the year 1930. The Collector of Land Revenue took proceedings under Part XVIII of the Land Code Enactment for the sale of the land in question. As a result of those proceedings the land was put up for sale by public auction on December 17, 1930 and purchased by the 2nd and 3rd defendants for the sum of $1,175. The land was sold by the Collector free from incumbrances but at the time of the sale it had already been charged in favour of the 4th defendant, who was not aware of the sale till it had taken place and the 2nd and 3rd defendants declared purchasers. The 4th defendant then consulted his Solicitor on the possibility of having the sale annulled but upon being advised that annulment was not possible, he bought over the land for $6,000. The plaintiff claimed annulment of the sale on the grounds that the notice of sale was not in due form according to Sections 208 and 209 of the Land Code Enactment and that no notice of sale was given to the registered chargee. At the trial Counsel for the plaintiff applied for leave to amend the Plaint by including an alternative claim for damages. The application was granted and the Plaint amended accordingly.

*Wright*, for the plaintiff, referred to Section 208 of the Land Code. He argued that Section 5 only refers to seal. Notice of sale was no notice as it had no seal. It was also not served within 60 days. Notification 8196 of the 7th November 1930 was inconsistent with the notice served on the plaintiff. The Collector is not an auctioneer (see Enactment No. 2 of 1929 Section 4). The idea of a public auction is that the sale shall be published in advance. If the Collector sold free from incumbrances he should in equity give notice to the iincumbrancers. Rule 2 of 1926 Rules (Auction Sales) requires incumbrances to be set out. The Collector has discretion to sell subject to incumbrances. This land was sold to recover $20.50. Section 221 deals only with annulling sales but leaves question of damages open. The plaintiff may be entitled to recover damages though he cannot have the sale annulled. This only rules out the annulling of the sale. "Annul" is distinguished from "contest" the legality." See *Stephen* v. *Vallipuram* C.A. 7 of 1927 and Order (8). He cited *Vyramuthu* v. *State of Pahang*, 4 F.M.S.L.R. 227 and Order 227 and *Collector of Tapah* v. *Chong Loke Chong*, 3 F.M.S.L.R. 60. The sale was no sale and a nullity. He referred to Section 235 of the Land Code as to purchase by a nominee of Land office Clerk.

*Bridge*, for the 1st Defendant, contended that by Section 221 of the Land Code the plaintiff must prove substantial injury "by reason of the irregularity complained of," and referred to Section 310 of the Civil Procedure Code. There must be direct evidence to shew loss resulted from the irregularity. He also referred to Section 33 of the Bengal Revenue Sales Law, wich is the origin of Section 221 of the Land Code. The original of Section 33 is Section 311 of the Indian Civil Procedure Code of 1882. Irregularity contains illegality. He cited *Olpherts Meenaghten* v. *Peshad Singh*, L.R. 10 I.A. 29, *Arunachalam Chetty* v. *Arunachalam Chetty*, 15 I.A. 171, *Tassadul* v. *Ahmad Hussain*, 20 I.A. 165, *Shaffudin Hussain* v. *Cheras Das*, 45 I.A. 205 (64 C. 225). See 41 Calc. 277. There was no duty to notify chargees and the State was the first chargee. (See Section 28 of the Land Code). It is not inequitable to sell free of charge. *Stephen*

v. *Vallipuram* (supra) is distinguishable. *Vyramuthu* v. *State of Pahang* does not apply. The plaintiff has no right to damages against the State. The defaulter's remedy is to apply to set aside the sale. See *Tassaduck* 20 I.A. 176. There is no analogy in the Civil Precedure Code. Existence of arrears justifies proceedings and errors in procedure which do not cause damage are not to be treated as making the whole sale a trespass. See Section 227 of the Land Code. The plaintiff should apply to the Court. The plaintiff could exercise due care for avoiding the sale. He referred to 5 Halsbury's Statutes, p. 150, Section 19.

*Farr*, for the 2nd Defendant, *Jeff*, for the 3rd Defendant, and *Briggs*, for the 4th Defendant adopted similar arguments. *Briggs* contended further that his client was a *bona fide* purchaser and referred to Stroud's Judicial Dictionary, pp. 202 and 2193. He cited in support *Assets Co.* v. *Nor Roitu*, (1905) A.C. 176, *Gibbs* v. *Messer* (1891) A.C. 248. He also referred to Hogg on Australian Torrens System p. 350, Wiseman on Transfer of Land Acts pp. 94 and 216 and Hogg on Registration of Title to Land, p. 147.

*Wright*, addressed the Court in reply.

*Wright* for the plaintiff.

*Bridge*, Deputy Legal Adviser, for the 1st Defendant.

*Farr*, for the 2nd Defendant.

*Jeff*, for the 3rd Defendant.

*Briggs*, (*Foster* with him), for the 4th Defendant.

*Cur. Ad. Vult.*

**BURTON, J.**—The Plaintiff was the owner of a piece of land some nine acres in extent and comprised in Grant 4381, which lies on the sea-shore not far from Port Dickson. He failed to pay the quit rent due to the State for the year 1930, and the Collector of Land Revenue Port Dickson took proceedings under Part XVII of the Land Code for the sale of the land. As the result of those proceedings the land was put up for Public auction on 17 December 1930 and knocked down to Sabapathypillai, the second defendant, and Shanmugam the third defendant for $1175. One fourth of the purchase price was deposited in the Land Office by the purchaser immediately after the sale. The land was sold by the Collector free from encumbrances, but the fourth defendant J. R. Evans held a charge over the land for $8000. He was not aware of the sale and did not know the land had been sold till after the sale had taken place and defendants Nos. 2 and 3 declared purchasers. He then consulted his Solicitor Mr. R. T. Foster as to the possibility of annulling the sale; but on receiving advise that the annulment was not possible, he entered into negotiations and bought the land for $6,000. He is now the registered Proprietor of the land. The Plaintiff now seeks to annul the sale or in the alternative claim damages against the State.

The Plaintiff admits that he never paid the quit rent for 1930 and that the Collector had the right to proceed to sell the land for the arrears; but he seeks to annul the sale on the ground of certain irregularities in the procedure. These irregularities are four in number:—

(1) The notice of sale (Exhibit A) served on the Plaintiff did not bear the official seal of the Collector.

(2) The notice of sale was served on the Plaintiff on 8th October and the sale fixed for the 3rd December. This is in breach of section 208 of the Land Code which provides that the notice of sale must specify ' the place and date on which such land will be sold for the recovery of arrears and costs, which shall not be less than sixty days from the service of the said notice."

(3) The notice of sale as issued under section 209 was inconsistent with the notice served on Plaintiff (Exhibit A.) in that it specified the date of the sale as December 17th, the date on which the sale was actually held. The date of the sale was altered by the Collector from December 3rd to December 17th not with the object of curing the irregularity on *Exhibit A* but to comply with the requirements of section 209 that a period of not less than thirty days must elapse between the date of the issue of the Gazette Notification and the date of the sale.

(4) There was a breach of Section 235 (i) of the Land Code because Shanmugam the third defendant was merely a nominee of Vasagam who was at that time Chief Clerk in the Land Office at Port Dickson.

The first three irregularities are admitted. It is only their legal effect which is in dispute; but the fourth irregularity raises an issue of fact.

Sabapathypillai, the second defendant, was called for the Plaintiff and gave evidence as follows:—

> "Shanmugam is not the beneficial owner, but he holds two-thirds for Vasagam the beneficial owner. The land was knocked down to me. After the sale was over the arrangement was made that Vasagam wanted a share in the land and I gave it to him.....Vasagam is co-proprietor with me of the land. Vasagam was Land Office Clerk at Port Dickson."

And later in cross-examination he says that Vasagam asked for the share fifteen minutes after the sale. Mr. Briggs for the fourth defendant argued very strongly that even if this evidence were taken at its face value, it would not constitute a breach of section 235 (i) because the arrangement was not made till fifteen minutes after the land was knocked down, and that consequently Vasagam did not come in till the sale was complete. But if I believed Sabapathypillai's evidence, I do not think that I should have any difficulty in bridging that short period of time and holding that the sale was in contravention of the section. But I find his evidence impossible to believe; it is contradicted by Shanmugam himself whom I thought a quite reliable man, and it was denied also by Vasagam. On the score of credibility I do not hesitate to prefer the evidence of these two men to that of Sabapathypillai. Moreover Shanmugam gave a very plausible reason for the existence of the story, namely that Sabapathypillai had invented it in order that by holding out the threat of an accusation against Vasagam, he might induce Vasagam to influence Shanmugam not to sue him for Shanmugam's share of the $6,000 which Evans had paid for the land. I find support for this suggestion, and striking confirmation of my estimate of Sabapathypillai's evidence in the letter *Exhibit K*. When Evans found that he had lost his security for the Plaintiff's debt, and after he had been advised that he had no hope of annulling the sale, he approached Sabapathypillai and agreed to purchase the whole of the land for $6,000. Sabapathypillai's story now is that the $6,000 was the price of the one-third share, but Evans' evidence is clear and I accept it. But Sabapathypillai has attempted to bolster up this story with what looks to me very like a forgery. The words of *Exhibit K*. now are

> "and this is to authorise you to pay the said R. G. Sabapathypillai only the sum of five thousand dollars, etc."

But the copy of *Exhibit K*. which Sabapathypillai annexed to his statement of defence does not contain the word "only" and in the original the word has obviously been inserted. A magnifying glass reveals an erasure where the comma after the name would originally have stood. The effect of this alteration is to make it appear that Evans paid the $6,000 for Sabapathypillai's share. But I had formed my opinion of the worthlessness of Sabapathypillai's evidence before I saw *Exhibit K*. and I reject the story of Vasagam's complicity entirely.

The right of the defaulter to obtain annulment of a sale for arrears of quit rent is limited by section 221 (i) of the Land Code:

> "No sale for arrears shall be annulled by any Court except upon the ground of its having been made contrary to the provisions of this enactment, and then only on proof that the Plaintiff has sustained substantial injury by reason of the irregularities complained of."

This section appears to be based on section 33 of Revenue Sale Law of India, Act XI of 1859, which was borrowed from a section in the Code of Civil Procedure which re-appears now in our Code as section 310; and in *Rajah Gobind Lal Roy* v. *Ramjanam Misser* XX I.A. at page 174 the Privy Council says

"In the opinion of their Lordships, a sale is a sale made under Act XI of 1859 within the meaning of the Act when it is a sale for arrears of Government Revenue, held by the Collector or other Officer authorised to hold sales under the Act, although it may be contrary to the provisions of the act either by reason of some irregularity in publishing or conducting the sale, or in consequence of some express provision for exemption having been directly contravened."

The Judgment then goes on to refer to the words "and then only on proof that the Plaintiff has sustained substantial injury by reason of the irregularity complained of" and goes on to say "It is difficult to suppose that the introduction of that sentence into the Act of 1859 could have been intended to have the effect of excluding from section 33 all cases of illegality as distinguished from irregularity."

I think therefore there can be no doubt that the first three irregularities of which Plaintiff complains, although strictly illegalities are irregularities such as are contemplated by section 221, and I do not think there can be any doubt of the meaning of the words of sub-section (i) which I have quoted, that in order that an irregularity may be the cause of annulling a sale, there must be direct evidence not only that there was substantial injury, but that the damage flowed from the irregularity. But in this case even if I assume that there was substantial injury, I can find no evidence that it was directly caused by the irregularities. The evidence of the Plaintiff himself was far from satisfactory. He either forgot altogether about the rent due on this land, or trusted that Evans had paid it. He says

> "On 17th November I went to the Land Office at Seremban to see about my own and my wife's quit rent. I was told that my wife's quit rent had been paid by Evans as to the land charged to him. I did not think any more of this land at Port Dickson. I thought the rent had been paid by Mr. Evans also. I inferred this because he had paid my wife's quit rent in Seremban and he lived 2½ miles from the land office at Port Dickson. I assumed that the Port Dickson Collector would have written in the same terms as the Collector Seremban."

and later in cross-examination.

> "I heard about the irregularities after seeing Mr. Wright, about two weeks before we filed the Plaint."

It is obvious that if there was damage at all, it arises from the sale of the land at an unduly low price. But even if the land were sold at an unduly low price, it is patent that the absence of the seal on the Notice of Sale served on the Plaintiff can have had no effect whatever on the price realised at the auction. Equally so the defect in the notice *Exhibit A*. The public advertisements of the sale were all in the form of the Gazette Notification and contained the date on which the land was actually sold. The only person who could have been misled by the irregularity in *Exhibit A*. was the Plaintiff himself. But that he was not misled is clear from his evidence

> "I was worried by my wife's illness and the pressure of the Chetties and I did not look at these notices."

This definite statement followed a lot of rather childish prevarication, the effect of which I take to be really summed up in the words I have quoted. Neither did he go to Port Dickson on 3rd December. If he had gone he would either have seen the notice postponing the sale from the 3rd December to the 17th December, or he could have informed himself of the new date at the Land Office.

It is perfectly clear therefore that no substantial damage was caused to the Plaintiff by reason of these irregularities and that therefore the sale cannot be annulled. This finding concludes the case against the second, third and fourth defendants.

Another irregularity was alleged that the Chargee did not have notice of the proceedings against the land. But there is no statutory requirement that he should have notice and the practice of Land Offices seems to differ. I understood this was not pressed as an irregularity. I do not think there is any duty to inform the Chargee. I have still to consider whether the first defendant is liable in damages to the Plaintiff for the wrongful sale of his land.

Mr. Wright for the Plaintiff relied especially on two local cases, *Collector of Land Revenue Tapah* v. *Chong Loke Chong* III F.M.S. Reports 60 and *Vyramuttu* v. *the State of Pahang* IV F.M.S. Reports 277. In the latter case he relied on the words of Sproule Ag. C.J.C.

> "The public interest requires that land revenue should be paid; and for that end very wide powers are given to Collectors. But the public interest demands also that no man should suffer disturbance of his rights of property safe by due course of law .....Each and every condition and preliminary required by law, and every duty incumbent upon him as a public servant and intended to safeguard the rights of the citizen, must be exactly and strictly fulfilled before he can become clothed with authority and lawfully enter upon a man's land and sell or resume it for arrears of land."

These words are very wide, but they must of course be considered in their context and in relation to the facts of the particular case. The irregularities in *Vyramuttu's* case which was governed by the 1911 Land Enactment were

(1) Land with a house on it was sold as a vacant lot.

(2) There was no attempt to ascertain if the arrears could be recovered out of the owner's movable property, a breach of section 72 of the Land Enactment 1911, which makes ineffectual proceedings against personal property a condition precedent of the right to proceed against land. There was therefore in *Vyramuttu's* case no right to proceed against the land at all.

(3) The sale was void by reason of neglect to advertise it by proper posting and to have the notice of sale sent to be entered on the Register of Titles.

The case of *Vyramuttu* therefore bears little resemblance to the present case, the outstanding point of difference being that in *Vyramuttu's* case the Collector sold the land in circumstances in which the law gave him no right to do so, and committed a trespass, while in the present case the action if the Collector was sanctioned by laws but marred by irregularities. I doubt therefore very much if the words of Sproule Ag. C.J.C. which were directed to the case of a flagrant invasion of the rights of a subject can be applied without reserve to the less important irregularities of the Plaintiff's case. Section 68 of the Registration of Title Enactment 1911, so far as it applies to the case is as follows:

> "No notice of sale for the recovery of any quit-rent due to the State shall affect any land until the Registrar shall be served with a copy of the notice of sale."

This is imperative and constitutes the Collector a trespasser. But the inclusion of section 207 in the Land Code of 1926 has removed one analogy between this present case and *Vyramuttu's* and one ground upon which trespass could be alleged.

In the *Collector of Tapah's* case Mr. Wright relied on two passages, one in the judgment of Woodward C.J.C. at page 65.

> "My view is that unless each step prescribed by the Land Enactment 11 of 1911 is duly taken, the sale by the Collector against the will of the registered proprietor must necessarily be void."

and the other in Farrer-Manby J.C's Judgment at page 69.

> "I am of opinion the sale being under the provisions of the Land Enactment 11 of 1911 and those provisions never having been complied with, the sale was in law no sale and a nullity."

But this case was in many ways an unsatisfactory case as is patent all through the judgments in the Court of Appeal, for the facts were never properly elucidated, and Woodward C.J.C's judgment continues the quotation I have made above with the saving sentence.

> "That is an expression of opinion. I feel that I cannot decide the question while the facts are in dispute."

But anyhow what facts were disclosed in this case are sufficient to make it quite unlike the present case, for the notices were issued by

mistake against Lot 119 instead of Lot 19 and personal service on Chong Loke Chong was never effected. This case therefore is to be distinguished on the ground that the initial step was never taken against Chong Loke Chong's land, whereas in the present case the step was duly taken but with irregularities which occasioned no damage.

The first step in proceedings against the land under Part XVIII is the issue of the "Notice of Sale of Land." The notice in this case is *Exhibit A*. The first irregularity alleged against it is that it does not contain a seal. This point was not pressed very strongly by Mr. Wright but it was not abandoned. Section 208 provides that the notice of sale shall be "substantially in the form in the Schedule XLIII and the form contains the words "Given under my hand and seal this.....day of.....19..." and a place is indicated for the impress of the seal. No authority was quoted to me that the absence of a seal in such a case nullifies the effect of the document, and I have been unable to find any. There is no express provision of law which makes the seal essential to the validity of the notice. There is no allegation that *Exhibit A* was not regularly issued or that it misled anyone, and as far as I can see the practical effect of the omission is no more than if the Collector had failed to dot an "i" or cross a "t." There is very little said about sealing in the body of the Land Code. Section 56, for example, provides that Grants and Leases of State Land shall be sealed with a public seal of the State, and section 178 that an official attesting a document shall authenticate his signature by his official seal; but ordinarily the legislature has left the necessity of a seal to be implied from the insertion of the letters L.S. in a ring at the bottom of some of the forms in the Schedule. But even then there are strange omissions for which I can conceive no explanation, see for instance Schedule XXXI, XXXII, and XXXIII.

The second irregularity was in the service of the notice. This does not depend on an inherent defect in the notice itself. It was issued on 1st August, 1930, fixing the date of the sale for the 3rd, December; and it was no doubt issued in the usual course to a serving Officer for service. The serving Officer no doubt knew, he ought to have known, that he could not serve this notice after the 3rd October, but he nevertheless served the notice on the 8th October.

In the course of the year the Collector of any district institutes a very large number of proceedings against land under section 208 of the Code. The Gazette Notification No. 8196 of 1930 notifying this land for sale contains some six or seven hundred defaulters in Port Dickson District alone and there must have been many more notices issued in the first instance which were never carried to the stage of Gazetting the sale. It is of course not humanly possible for a Collector to carry out such proceedings without an occasional irregularity. Woodward C.J.C. said in the *Collector of Tapah's case* at page 66:—

> "It is a mistake for which no one can be held to blame. The work of the Land Office is full of details, and mistakes there are bound to occur from time to time; resulting in mistakes in the register."

But I think that to hold that every such trivial error constitutes the whole of the proceedings a nullity and gives rise to an action for trespass is the negation of reason; and I am confirmed in the view by section 227, which must have been enacted to meet this very difficulty. I have no doubt that the Plaintiff knew what this document (*Exhibit A*) was when it was served on him; and I have no doubt that he knew that the rent on this land was not paid, and had to be paid. He does not admit this in so many words in his evidence, but his disingenuous fencing with the questions put to him and the naive foolishness of some of his replies admit no other conclusion. But whether he knew of these defects or whether he neglected to read the notice I think the effect is the same and he cannot ignore this remedy and lie by in the hopes of suffering and obtaining heavier damages. Sir Richard Couch delivering the judgment of the Privy Council in *T. R. Arunachellam Chetti* v. *V. R. R. M. A. R. Arunachellam Chetti* XV I.A. at page 174 said:—

> "Therefore as far as regards the objection that the description was insufficient, which is relied on, as their Lordships understood, as vitiating the sale.....the objection was not taken until the sale was completed. The judgment debtors knowing, as they must have known, what the description was in the proclamation, allow the whole matter to proceed until the sale is completed, and then ask to have it set aside on account of the misdescription.....It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any misdescription of the property attached and about to be sold, which he knew well, but of which the execution creditor or decree holder might be perfectly ignorant,—that they should take no notice of that, allow the sale to proceed and then come forward and say the whole proceedings were vitiated. That, in their Lordships' opinion, cannot be allowed, and on that ground the High Court ought to have given effect to this objection."

Section 227 re-enacts section 79 of the land Enactment 1911, but this section does not appear to have been referred to or considered in either the *Collector of Tapah's case* or *Vyramuttu's case*. In the former it could not be invoked because personal service was never effected on Chong Loke Chong and the notice was never posted on the land so that it is to be inferred that he knew nothing of the proceedings; and in *Vyramuttu's case* it appears that the irregularities were not discovered till the sale was completed.

I conclude therefore that it is not competent for Plaintiff now to rely on these irregularities. There is I think only one other point with which I need deal. In the course of the hearing the Plaintiff made vague allegations that the sale was not properly advertised, but he gives no detailed grounds of complaint. This point was not pleaded in his plaint. The only statutory requirement is section 209, and from the evidence of Abdulrahman bin Mat the Assistant Collector of Land Revenue, I am satisfied that the usual methods of advertisement were followed and that nothing can be alleged against the sale on that account. It was conceded that the provisions of the Auction Sales Enactment do not apply to these sales. There is no doubt that the land was sold at a very cheap price. The evidence of the true value of the land is very conflicting. The Plaintiff himself put it at the absurd figure of $35,000; Mr. Crawford assessed it at $10,000 and Mr. Cunningham at $4,000. Of these valuations I prefer Mr. Cunningham's; he has lived at Port Dickson for a long time and has had a wide experience of land transactions there, and the value he gives accords with the records of actual transactions. But even if we accept that figure, I do not think that the Plaintiff necessarily has any cause of complaint. This piece of land has a very special value. It is suitable for nothing but a seaside bungalow, and it has obvious defects even for that purpose: and moreover it was sold at a time of depression when the market for land of this sort would be affected more adversely than other land. And whether or not land of this character will fetch its true market value is at the best of times problematical and dependent on the chance presence of suitable purchasers. In this case it fell to a speculator. It might have realised a more adequate price if Mr. Cunningham had not mistakenly thought it was being sold subject to a charge, but there is no evidence that mistake was not confined to Mr. Cunningham or that any one but himself was responsible for the misunderstanding. I am of opinion therefore that the advertisement of the sale was not deficient, that the auction was conducted regularly and that although the price realised was very low, yet that was not due to any fault of the officers conducting the sale.

It follows that the action must be dismissed with costs.

From the above judgment the plaintiff appealed to the Court of Appeal which came on for hearing before Thorne, Ag. C.J. and Geraghty and Mudie, JJ.

*Veerasamy* for the appellant. The sale of the land was in contravention of the provisions of Land Code (1926). Section 208 of the Land Code provided that the notice of sale must specify "the place and date on which such land will be sold for the recovery of arrears and costs; which shall not be less than sixty days from the service of the said notice." The notice of sale was served on the plaintiff on October 8, 1930, and the sale fixed for December 3, which did not comply with the section quoted above. The notice of sale issued under Section 206 was inconsistent with the notice served on the plaintiff. The actual date of sale was December 17. The date was altered by the Collector not with a view of curing the breach of section 208 but in order to comply with Section 209. The land was put up for sale free from encumbrances and no notice of the sale had been sent to the registered Chargee. In consequence of this the appellant had suffered substantial damages. The appellant was willing to pay amount of rent and costs due to the Government in order to avoid the sale. He further argued that by the insufficiency of the time given by the notice of sale, the appellant had suffered material damages and that Section 221 of the Land Code (1926) did not preclude the appellant from recovering damages even though the annulment of the sale could not be ordered. The acts of the Collector of Land Revenue leading up to the sale of the land in question were materially irregular and materially transgressed the provisions of the Land Code Enactment of 1926. The Collector of Land Revenue was a trespasser on the rights of the appellant and the appellant had thereby suffered great loss. The sale was negligently conducted and certain irregularities occurred during the sale. In ordering the sale of land without having regard to the chargee, the 4th defendant, the Collector failed to exercise his discretion equitably and judiciously.

*Bridge*, the Deputy Legal Adviser, on behalf of the State of Negri Sembilan: It is very important to ascertain whether the appellant suffered any loss by the irregularity.

His Lordship: There was evidence of irregularities and evidence of loss.

The D.L.A. then referred to several Indian cases in the Privy Council. At a later stage he argued that it was a trivial irregularity, not important enough to be relied on by the appellant.

*Veerasamy* for the Appellant
*Bridge*, D.L.A. for the 1st Defendant

The Judgment of the Court was delivered by

THORNE, Ag. C.J. This is an appeal against the judgment of Mr. Justice Burton refusing to the appellant any relief in an action brought by him claiming originally to annul a sale of land by the Collector of Land Revenue to realise rent due to the Government.

The Plaintiff is the owner of a piece of land held under Grant No. 4381. On the 17th of December 1930 that piece of land was offered for sale by public auction, and sold by the Collector of Land Revenue for a sum of $1,175 in purported exercise of his powers to sell land to recover arrears of rent, in this case a sum of $19.50.

The plaintiff-appellant contended that the action of the Collector of Land Revenue was not authorised by statute, and he accordingly sued the Government, two persons who were present and bought the land at the auction sale, and Mr. Evans the 4th respondent, who was the purchaser from them subsequently to the auction.

The Plaintiff alleged certain acts or omissions by the Collector, and failure to comply with the provisions of the Land Code. During the hearing of the case, counsel for the plaintiff appears to have realised that, by reason of the provisions of Section 42 of the Land Code, in the circumstances of the 4th respondent having got on the Register of Titles, it would be impossible for the Court to make an effective order on this claim for the annulment of the sale.

That being so, counsel applied for leave to amend his claim by adding a claim for damages; but he conceded at the time that the amendment would be directed only against the 1st respondent.

The learned trial judge held, I think correctly, in the circumstances of the case, that no effective order could be made annulling the sale even if the Court were satisfied that the plaintiff had established such a set of facts as would justify the Court in making such an order.

On the question of damages he dismissed the plaintiff's claim, and entered judgment for the defendants.

The plaintiff appealed to this Court.

For some reason I am unable to understand, the appellant served his notice of appeal on all the respondents, although the grounds of appeal limit the appeal to the question of damages only. That is a matter which we shall have to deal with later in discussing the question of costs.

My view of the matter is that no appeal has been preferred against the judgment of the learned trial judge in so far as he held that the plaintiff was not entitled to an order annulling the sale. That being so, no claim for damages having been made against the 2nd, 3rd or 4th defendants, it is entirely unnecessary to bring them here.

Upon the question of damages I am of the opinion that the learned trial judge was in error.

Part 18 of the Land Code makes provisions for the recovery of land revenue by the Collector of Land Revenue. Section 203 of the Code provides that any annual rent not paid before the 1st day of April shall be "an arrear" and every person liable therefor shall be a 'defaulter.'

Section 205 makes provisions for the service of notice upon the defaulter specifying the amount due, and if the sum due is not paid, for seizure and sale of movable property.

Section 208 provides that if the arrears and costs are not paid, and are not recovered by the sale of any movable property, the Collector may proceed against the land in respect of which it is in arrear, and realise the same. The section continues:—

> "and serve a notice of sale substantially in the form in Schedule XLIII on the defaulter, specifying the place and date on which such land will be sold for the recovery of arrears and costs, which date shall not be less than sixty days, from the date of service of the said notice."

That is a statutory provision prescribing the steps to be taken by the Collector in his proceedings prior to the sale of the land in respect of which rent is due.

In my opinion that is a statutory duty which must be complied with implicitly by the Collector. A failure by the Collector to comply with that provision renders his proceedings void.

Section 209 provides that the Collector shall issue, post and publish in the Gazette, notices specifying the land in respect of which rent is due, the place where and the date upon which that land will be sold. In my humble opinion the particulars required to be specified in those notices are identical with the particulars required under Section 208, so that the notice served on the defaulter and the notice published should refer to the same piece of land and specify the same date and place for the sale of that land. Section 211 provides:—

> "Except as hereinafter provided all lands so specified shall at the place notified and on the day notified, or on the day or days following, or on the day to which the Collector may postpone the sale of them, be put up to public auction by and in the presence of the Collector, and shall be sold to the highest bidder."

My interpretation of that section is that the Collector has a statutory right to offer for sale the land of the defaulter provided and provided only he offers for sale the land in respect of which the notices have been issued under

Sections 208 and 209, and he can offer that land for sale by auction only at the time, on the date, and at the place which have been notified under these two sections.

If the Collector offers the land of a registered holder for sale except in the terms of that statutory provision, the Collector is a trespasser.

The learned trial Judge in discussing this question speaks of some of these omissions, which are complained of by the appellant, as being trivial irregularities; and he points out very truly, that in a busy Land Office there are great many of these cases to be dealt with, and his judgment appears to me to adopt the argument that was addressed to him on the part of the 1st respondent that, by reason of the difficulties which arise in a Government Office, the statutory provision must be interpreted somewhat liberally otherwise the task of the Land Office would be almost impossible.

I regret that I am unable to share that view. It seems to me that the function of the Court is first of all to interpret the provisions of the statute, and having done so, to enquire whether the Collector has, in the performance of his duty, complied with the terms of the statute.

Here the Collector issued and served upon appellant a notice of sale informing him that his land would be sold on the 3rd December. On the facts it is conceded by the present respondent that that notice was served 5 days less than the sixty days provided by the statute.

The statutory power of the Collector is to fix a date not less than 60 days. Any period fixed by him less than 60 days is a failure in his statutory duty, and in my humble opinion renders the notice which he serves nugatory; it is as though he had served no notice.

The next step is that the Collector fixed the sale and published it under Section 209, for the 17th December. He fixed times under the two notice which are not identical.

Here again, reading Sections 208 and 209 it seems to me that in order to comply strictly with section 209, the Collector should specify the same place and the same date as that specified under Section 208. The property was offered for sale on the 17th December and knocked down to the 2nd and 3rd respondents. Subsequently the 4th respondent bought it from them, the necessary transfers were completed, and the 4th respondent's name was placed on the Register as the registered owner of that land.

It may well be that the provisions of Section 208 cast a very heavy burden on the Collector of Land Revenue. But that is not a matter for this Court to consider, it is a question for the Legislature.

I hold that if a Collector desires, in exercising his powers as such, to recover his arrears of land revenue, to put up property for sale in default of payment, he must comply strictly with the requirements prescribed by the Land Code. If he fails to do so, his power or right to sell land under Section 211 never arises, and his act in selling the land of the registered holder is an awful act, and an invasion of the right of property of the land holder. I am confirmed in that view by the opinion of the members of the Court of Appeal the President of which was a very experienced Land Officer and Judge, in the case of the *Collector of Land Revenue Tapah* v. *Chong Loke Chong and another*—3 F.M.S. Law Reports page 60. Sir Lionel Woodward said:—(page 65)—

> "My view is that unless each step prescribed by the Land Enactment is duly taken, the sale by the Collector, against the will of the registered proprietor, must necessarily be void."
> Now, it is argued on behalf of the Government that section 221 of the Land Code is an answer to the appellant's claim. That section reads:—
> (I). "No sale for arrears shall be annulled by any Court except upon the ground of its having been made contrary to the provisions of this Enactment, and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of; and no person shall be entitled to contest the legality of a sale after having received any part of the purchase money.
> (II). No suit for annulling a sale be brought in any Court after the expiration of three months from the date of the registration of the transfer under section 218."

I have to observe that the language of that section is that no sale can be annulled. We are not here on the question of the annulment of the sale. The language of that section in not "no action shall lie" or "no action shall be brought." If it were so, the case woold be different. In my view the plain language of that section only deals with a claim for the annulment of a sale,

It was argued by the learned Deputy Legal Adviser that because that section deals with annulment of sale, there is also a restriction on the jurisdiction of the Court, so that the Court cannot declare a sale to be void, or express an opinion to that effect by reason of the provisions of that section. I regret that I am not able to share that view.

He has next urged upon us that the holder of the title stood by and allowed this sale to go on, and thereby it must be held that he has acquiesced in the sale. My view of that argument is that it is not tenable. There is no duty cast on the members of the public to give Government officers any advice as to the interpretation of the provision of law with which they have to comply in the exercise of their statutory rights and powers. The public need do nothing. I see no ground whatever to support the argument that the appellant stood by and acquiesced in any way.

The members of the public are not the mentors of the Collectors of Land Revenue who are supposed to know the law and comply with it. If they do not comply with it, the result of their non-compliance will be the usual consequences.

Under the provisions of the Government Suits Enactment, 1928, the Government of this Federation assumed responsibility for the acts of public officers, acting or purporting to act in good faith in pursuance of the duties imposed on them by law. Any default by a Government Officer is remedied by action against Government. That being so, I think that the appellant is entitled to bring this action against the Government, for a declaration that he is entitled by reason of an invasion of his rights to recover damages, if he is able to establish that he has sustained any by reason of the mistake or omission of the Collector of Land Revenue. In my view, therefore, the judgment of the learned trial judge should be reversed, and judgment should be entered for the plaintiff declaring that there was an invasion of his rights by the action of the Collector of Land Revenue; that he is entitled to have an enquiry held as to what damages, if any, he has sustained; and if any be found, to judgment for that amount.

The attention of the Judges has been drawn to the majority judgment of the Court of Appeal in the case of the *Pahang Consolidated Company* v. *The State of Pahang*, which decided that the principle applicable in England as to the right of a pauper plaintiff to recover costs under a favourable judgment, has application to the case of Government, and that they are entitled only to recover what are commonly spoken of as pauper costs. The members of this Court of Appeal unanimously disapprove of that majority judgment, and are of the opinion that it is not good law, and should not be followed in the Federated Malay States.

Following the line of cases in *Raymond* v. *Lakeman*, 34 Beav. 584; *Galloway* v. *Corporation of London*, 1867 L.R. 4 Eq. page 90; *Henderson* v. *Merthyr Tydfil Urban District Council*, 1900 1 Q.B.D: page 434; and *Mohamed Alim Ollah Sahib* v. *The Secretary of State for India*, I.L.R. 17 Madras, page 162; this Court is of the opinion that under Section 73 of the Courts Enactment, the Government are entitled to recover costs in exactly the same manner as an ordinary litigant, and are equally liable to pay costs in exactly the same way.

In the circumstances of this case, the Court is of the opinion that the more convenient order to be made is to avoid cross-taxation in this case, so that the order of the Court will be that the judgment of the Court below will be reversed, the plaintiff in the Court below will be entitled to recover from the 1st defendant two-thirds of his costs, that is to say, the Registrar as taxing master will tax the cost as between party and party, calculate two-thirds of the total, and by his allocatur certify for that amount. The 2nd, 3rd and 4th defendants will recover their costs from the plaintiff. With regard to the costs of the appeal, the appellant will pay the costs of the 2nd and 4th respondents, and will recover against the 1st respondent two-thirds of the costs of the appeal.

The action will have to be remitted to the Seremban Court again with direction to try as the Judge may see fit the question as to the amount of damages, if any, established by the appellant against the 1st respondent.

Gerahty and Mudie, JJ., concurred.

The Order made was:—

Appeal allowed. Judgment below upheld upon the question of annulment of the sale and reversed upon the question of damages. The appellant to recover against the 1st respondent two-thirds of his costs to be taxed as between party and party both here and below. The appellant to pay the costs of the 2nd, 3rd and 4th defendants in the Court below, and the costs of the 2nd and 4th respondents in this Court, all to be taxed as between party and party.

[APPELLATE CIVIL JURISDICTION]

## TAN SOO (f)

AND

## FREEMAN & MADGE.

[KUALA LUMPUR CIVIL APPEAL No. 2 OF 1932]

*Solicitor & Client—Agreement as to costs—Necessity for writing—Oral contract unenforceable by Solicitor—Petition for recovery of balance of costs—Ascertainment of proper charges—Advocates & Solicitors Enactment No. 22 of 1914, Ss. 22, 23, 24, 26 & 30; Attorneys & Solicitors Act of 1870.*

A firm of Advocates & Solicitors had acted for a client in a successful appeal. They delivered a bill of costs as between party and party to the unsuccessful party, which, after taxation, was paid. They paid to the client the amount of out of pocket expenses and retained the balance. The client filed a petition to the Court under S. 26 of the Advocates & Solicitors Enactment for recovery of the balance in the hands of the Solicitors. The petitioner based her claim upon an oral agreement to the effect that all moneys recovered by her Solicitors as costs should be paid to her. The existence of the oral agreement was denied.

*Held*, that the petitioner should have pursued her remedies by way of action and not by petition.

*Held further*, that Ss. 22, 23, 24, and 30 of the Advocates & Solicitors Enactment have no application to an oral agreement between an Advocate & Solicitor and his client.

*Held further*, that such an agreement, being unenforceable by the Solicitors, the position, so far as they are concerned, is as though no agreement has ever been made between the parties.

*Held further*, that under the circumstances the Solicitors should be paid their proper charges to be ascertained by taxation.

Appeal to the Court of Appeal by Messrs. Freeman & Madge from the order of the Chief Justice, F.M.S. made on the 18th December, 1931.

*Shearn* (*Seenivasagam* with him), for the Appellants.

Respondent did not appear.

*Shearn* in opening the appeal stated that the appellants Messrs. Freeman and Madge were loth to appeal but at the request of the Bar Committee had consented to do so in order that a matter of great importance to the public and to the Bar might be submitted to the Court of Appeal for a ruling.

The Chief Justice had decided that the universal practice of the Bar was incorrect. The Bar Committee did not consider the decision of His Lordship to be in accordance with the authorities and it was desired to have a decision by the Court of Appeal. Messrs. Freeman and Madge did not wish to put a former client to trouble and expense and counsel was instructed that no matter what might be the result of the appeal no order for costs against Tan Soo was to be asked for nor would she be called upon to return any moneys already paid to her as a result of the decision in the Court below. Counsel, proceeding, directed the Court's attention to the irregularity of the procedure in the court of the Judge.

The Chief Justice should have decided the case in accordance with certain English cases which he quoted and he pointed out that the law as administered in India was similar to the law of England in this respect. The view he asked the Court to take was that as the arrangement between the solicitors and the client had not been reduced to writing, the proper order for the Judge to have made was that the solicitors should be directed to tax their bill as between solicitor and client. The Chief Justice had not made a correct order. He had applied certain sections of the Advocates and Solicitors Enactment but not others. The true position was that none of those sections applied at all to verbal agreements. He had found part of the contract bad and part good, whereas the contract was entire and indivisible. The effect of the